

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

ACTION INDUSTRIES, INC. AND
ACTION INDUSTRIES, INC.
HEALTH CARE PLAN,

Plaintiffs,

v.

NO. 1:96CV360-S-D

DAVID NOLAN LITTON,

Defendant.

OPINION

In this declaratory judgment action arising under ERISA, plaintiffs seek to enforce certain subrogation and/or reimbursement rights against defendant after he settled a products liability claim with American Honda Motor Company (Honda). That entity has interpled the proceeds of the settlement, \$17,000.00, into the registry of the court. Presently before the court is plaintiffs' motion for summary judgment.

The facts are not in dispute. Action Industries, Inc. Health Care Plan (Plan) is an employee welfare benefit plan established by Action Industries, Inc. (Action) to provide health benefits for its employees. Action is the plan administrator and sponsor. David Nolan Litton was employed by Action from 1987-1989, and was a participant in the Plan. In May, 1988, Litton was injured in an accident while riding an all-terrain vehicle. The Plan paid \$17,675.89 for medical expenses incurred by Litton as a result of that accident. Litton sued Honda, the alleged manufacturer of the vehicle, in state court. Subsequently, Litton and Honda settled for \$17,000.00, and Honda interpled those

funds into the registry of the court.

The issue at hand involves whether Litton must reimburse the Plan for the health benefits it paid on his behalf. There is no question about this court's subject matter jurisdiction over this cause. *See Sunbeam-Oster Company, Inc. Group Benefits Plan v. Whitehurst*, 102 F.3d 1368, 1374 (5th Cir. 1996) (state subrogation doctrines are preempted under ERISA).

Section 7 of the Action Industries Plan provides:

With respect to any payment made under the plan to or for the benefit of any participant...the plan shall be subrogated to the extent of such payments to all the rights of recovery of or on behalf of the participant...arising out of any claims or cause of action which may accrue to such participant...because of or as a result of any illness, injury, disease or other condition incurred or suffered by the participant...for which a third party may be liable or legally responsible by reason of negligence or other legal cause. The Committee may in its sole and absolute discretion pursue, on behalf the plan, the plan's right of subrogation. Any recovery from such third party as the result of a judgment, settlement or otherwise by or on behalf of such participant...shall be first used to reimburse the plan for all payments made under the plan with respect to such participant....[T]he participant...shall [not] take any action that would prejudice the rights of recovery with respect to such participant...against the third party. Such participant...shall take such action, furnish such information and assistance, and execute and deliver all necessary instruments as the Committee shall require to facilitate the enforcement of such rights.

The Summary Plan Description (SPD) summarizes the Plan's reimbursement/subrogation rights as follows:

In those cases where the covered person incurs any illness, injury, disease or other condition for which a third party may be liable or legally responsible, the Plan has the right to be reimbursed for payments that it has made or will make from any proceeds that the covered person receives by way of judgment, settlement or otherwise arising out of any claim the covered person has against such third party. The amount of this reimbursement is limited to what the Plan has paid or will pay the covered person on account of medical, hospital and other expenses incurred in connection with the injury, illness, disease or other condition for which the third party may be responsible. Any recovery received by or on behalf of the covered person from the third party is applied first to reimburse the Plan. This right of reimbursement is referred to as a "right of subrogation." Each covered person must cooperate with the Plan to facilitate the enforcement of the Plan's right of subrogation.

The Summary Plan Description Receipt & Agreement(s) (Receipt) signed by Litton in September, 1997, states:

I hereby acknowledge receipt of my Action Industries Health Care Plan Summary Description and agree to abide by its terms and conditions.

I further agree to promptly furnish and/or execute such information and/or forms as may be required from time to time by the Action Industries Health Care Plan. I further agree to comply with the Plan's Subrogation and Coordination of Benefit provisions which state that if I recover monies in the future for any claim previously paid by the Plan, I will reimburse or cause to have the Plan reimbursed accordingly for claims they have paid on behalf of me....

Clearly, the plain language of the Plan itself and the SPD give the Plan first priority rights of subrogation, i.e., "the beneficiary retains nothing until he has reimbursed the plan (or the plan has recovered through subrogation) all funds expended on medical costs of the beneficiary, dollar for dollar." *Whitehurst*, 102 F.3d at 1372. In Litton's view, however, the Receipt, which does not specifically restate those rights, creates an ambiguity, thereby leaving this court free to adopt a "make whole" rule, i.e., the Plan would get nothing until Litton has been made whole. *See id.* ("Under the Make Whole rule, a plan is not entitled to recoup anything by way of subrogation or reimbursement until the beneficiary has been made entirely whole through recovery of all compensatory damages to which he is entitled").

The court disagrees with Litton's position. The Receipt simply memorializes Litton's receipt of a copy of the SPD and in shorthand fashion states the reimbursement/subrogation rights of the Plan. The complete explanation of those rights is contained in the SPD, and Litton's signature on the Receipt did not relieve him of his duty to read the SPD and to "abide by its terms and conditions." Action and the Plan are therefore entitled to reimbursement for the medical benefits paid on behalf of Litton. Litton's alternative argument that he should be given credit for his

attorney's fees and expenses is also not well taken. Although the court is sympathetic to the problem posed here, the question of attorney's fees is a contractual one between Litton and his counsel. That matter and the clear subrogation rights of the Plan to any settlement proceeds should have been considered in negotiating the settlement. To hold otherwise would require this court to alter the terms of the Plan, a course patently barred under the law.

An appropriate order and final judgment shall issue.

This _____ day of August, 1998.

SENIOR JUDGE